

MIDDLETON, J., IN CHAMBERS.

OCTOBER 17TH, 1916.

PORT ARTHUR WAGGON CO. v. TRUSTS AND
GUARANTEE CO.

Executors and Administrators—Action against Administrator of Estate of Intestate—Breach of Trust by Intestate—Director of Company—Misfeasance—Quasi-contractual Obligation—Question of Law—Motion for Preliminary Trial—Rule 132.

Motion by the defendants for an order, under Rule 132, directing the determination of an issue of law before the trial of the other issues in the action.

The plaintiffs were a company in liquidation, and the action was brought by the liquidator. The defendants were the administrators of the estate of one Kloefer, deceased, who had been a director of the plaintiffs and also of the Speight Waggon Company Limited. The plaintiffs alleged that Kloefer had been guilty of misfeasance and breach of trust in respect of a sale of the assets of the Speight company to the plaintiffs for certain shares of the plaintiffs and certain sums in cash. It was charged that Kloefer had paid the price without deducting the amount of an incumbrance on the Speight property and had paid money out of the assets of the plaintiffs without authority. The assets of the Speight company were distributed among the shareholders and creditors of that company, and Kloefer, it was said, received a portion thereof. The action was brought to recover these moneys.

Kloefer died on the 9th February, 1913. This action was begun on the 9th October, 1914, more than a year after his death; so that, if the action could be maintained only by virtue of sec. 41 of the Trustee Act, R.S.O. 1914 ch. 121, the time-limit was a bar.

The defendants maintained that, apart from the statute, the action would not lie; this the plaintiffs denied; and the question of law thus raised was that sought to be determined as a preliminary issue.

The motion was heard in the Weekly Court at Toronto.

W. J. Boland, for the defendants.

Peter White, K.C., for the plaintiffs.

MIDDLETON, J., in a written judgment, said that, although an action *ex delicto* cannot be pursued against the personal